IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

C.W.P. No.2234 of 2007
Date of Decision: 22.2.2007

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Jasbir Singh Gill @ Dimpa

....Petitioner

Vs.

The Election Commission of India and another

.....Respondents

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Present : Mr.Rajiv Atma Ram,Sr.Advocate with Mr.Hemraj Mittal, Mr.Sunil Nehra and Mr.Abhishek Shukla, Advocates for the petitioner.
Mr.M.L. Sarin, Sr.Advocate with Mr.Hemant Sarin and MsAlka Sarin, Advocates for the Election Commission of India.
Mr.R.S. Cheema, Advocate General, Punjab with Mr.Sanjiv Sharma, Additional Advocate General, Punjab.
Ms.Daya Chaudhary, Assistant Solicitor General of India with Ms.Anjali Kukkar, Advocate for Union of India, Ministry of Home Affairs.
Mr.H.S. Mattewal, Sr.Advocate with Mr.Vikram Chaudhari and Mr.Sandeep Wadhawan, Advocates for the applicant in C.M.No.2916 of 2007.

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CORAM : HON'BLE MR.JUSTICE VIJENDER JAIN, CHIEF JUSTICE.
HON'BLE MR.JUSTICE RAJIVE BHALLA

1. Whether Reporters of Local Newspapers may be allowed to see the judgement ?

2. To be referred to the Reporters or not ?
3. Whether the judgement should be reported in the Digest ?

**VIJENDER JAIN, CHIEF JUSTICE (Oral)**

By this writ petition, the petitioner prays for the issuance of a writ, directing the Election Commission of India, to conduct elections in Beas Assembly Constituency of the State of Punjab, prior to 27.2.2007, the date fixed for declaration of results.

The short point, that has been agitated in this petition, and has been argued by counsel for the parties is vital to the conduct of free and fair elections. In a democracy, elections and their purity are essential to sustain democratic institutions. Article 324 of the Constitution of India clothes the Election Commission of India with powers to conduct free and fair elections. The Hon'ble Supreme Court from **N.P. Ponnuswami V. Returning Officer, Namakkal Constituency**, 1952 SCR 218 and **Mohinder Singh Gill V. Chief Election Commissioner,** 1978(1) SCC 405 and till today has upheld the primacy of the Election Commission regarding conduct of elections. The controversy in the present case is whether this Court in the exercise of jurisdiction under Article 226 of the Constitution of India, can direct the Election Commission, to prepone the election to a date, prior to the date, fixed for announcement of the results in the State of Punjab. This question would have to be answered in the light of the powers conferred on the Election Commission under Article 324 etc. as also in the light of the bar contained in Article 329(b) of the Constitution of India. Article 329(b) of the Constitution of India bars the calling into question, except by way of an election petition, any election to either house of parliament or to the house or either house of the legislature of a State. On

the basis of Article 329(b), counsel for the Election Commission has vehemently contended that this Court, in the exercise of its jurisdiction under Article 226 of the Constitution of India, cannot issue any direction to the Election Commission. In order to appreciate the aforementioned arguments, reference would have to be made to Mohinder Singh Gill's case (supra). Paras 28,29,30,31 and 32 are reproduced hereunder :-

> "28. What emerges from this perspicacious reasoning, if we may say so with great respect, is that any decision sought and rendered will not amount to 'calling in question' an election if it subserves the progress of the election and facilitates the completion of the election. We should not slur over the quite essential observation "Anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election". Likewise, it is fallacious to treat ' a single step taken in furtherance of an election' as equivalent to election.
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> 29. Thus, there are two types of decisions, two types of challenges. The first relates to proceedings which interfere with the progress of the election. The second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us, in the light of the illumination derived from Ponnuswami, is as to whether the order for re-poll of the Chief Election Commissioner is "anything done towards the completion of the election proceeding" and whether the proceedings before the High Court fecilitated the election process or halted its progress. The

question immediately arises as to whether the relief sought in the writ petition by the present appellant amounted to calling in question the election. This, in turn, revolves round the point as to whether the cancellation of the poll and the reordering of fresh poll is 'part of election' and challenging it is 'calling it in question'.

30. The plenary bar of Article 329(b) rests on two principles: (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. Durga Shankar Mehta (supra) has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's overall power to interfere under Article 136 springs into action. In Hari Vishnu (supra) this Court upheld the rule in Ponnuswami excluding any proceeding, including one under Article 226, during the on-going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition, but beyond the decision of the Tribunal the ban of Article 329(b) does not bind.

31. If 'election' bears the larger connotation, if 'calling in

question' possesses a semantic sweep in plain English, if policy and principle are tools for interpretation of statutes, language permitting, the conclusion is irresistible, even though the argument contra may have emotional impact and ingenious appeal, that the catch-all jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose of such a re-poll was to restore a detailed poll process and to complete it through the salvationary effort of a re-poll. whether, in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality, viz., the Election Tribunal. That aspect will be explained presently. We proceed on the footing that re-poll in one polling station or in many polling stations, for good reasons, is lawful. This shows that re-poll in many or all segments, all-pervasive or isolated, can be lawful. We are not concerned only to say that if the regular poll, for some reason, has failed to reach the goal of choosing by plurality the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of Dunkirk is part of the strategy of counter attack. Wise or valid, is another matter.

32. On the assumption, but leaving the question of the validity of the direction for re-poll open for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in

question a step in 'election' and is therefore, barred by Article 329(b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have then thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case."

A perusal of the aforementioned judgment leaves no manner of doubt that where a decision subserves the progress of election and facilitates its completion, it cannot be said to call into question the election and therefore, anything done towards the completion of the election cannot be described as questioning the election in terms of Article 329(b) of the Constitution of India. It would also be necessary to notice certain other judgements, as regards the power of judicial review.

After referring to the judgments in **N.P.Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218** and **Mohinder Singh Gill v. Chief Election Commissioner, 1978(1) SCC 405,** it was held as follows in **Digvijay Mote v. Union of India and others 1993 (4) Supreme Court Cases, 175 :-**

(9) " However, it has to be stated this power is not unbridled. Judicial review will still be permissible, over the statutory body exercising its functions affecting public law rights. We may, at this stage, usefully quote Judicial Remedies in Public Law- Clive Lewis, page 70:

" The term 'public law, has, in the past, been used in at least two senses. First, it may refer to the substantive principles of public law governing the

exercise of public law powers, and which form the grounds for alleging that a public body is acting unlawfully. These are the familiar Wednesbury principles. A public law 'right' in this sense could be described as right to ensure that a public body acts lawfully in exercising its public law powers. The rights could be described in relation to the individual heads of challenge, for example, the right to ensure that natural justice is observed, or to ensure that the decision is based on relevant not irrelevant considerations, or is taken for a purpose authorised by statute, or is not Wednesbury unreasonable. Secondly, ' public law' may refer to the remedies that an individual may obtain to negative an unlawful exercise of power. These are essentially remedies used to set aside unlawful decisions, or prevent the doing of unlawful acts, or compel the performance of public duties. These remedies now include the prerogative remedies of certiorari, mandamus and prohibition, and the ordinary remedies of declarations and injunctions when used for a public law purpose involving the supervisory jurisdiction of the Courts over public bodies."

(14) "The resultant position is that it cannot be stated that the exercise of power under Article 324 is not altogether unreviewable. The review will depend upon the facts and circumstances of each case."

In **A.C. Jose V. Sivan Pillai and others**, 1984(2) SCC 656, the Apex Court while relying upon Mohinder Singh Gill's case (SCC p.452, para 92) held that the Commission shall be responsible to the rule of law to act bonafide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fair play-in-action in a most important area of the constitutional order, viz.,elections.

Thus, a conjoint reading of the aforementioned judgements, leads us to a conclusion that the power under Section 329(b) of the constitution of India, would come into play only where a petitioner calls into question an election.

One cannot loose sight of what has been succinctly held by the Apex Court and in prophetic words of Y.K. Sabharwal, C.J.I. ( as his Lordship then was), in case **I.R. Coelho(Dead) by LRs V. State of Tamil Nadu & Ors.**, 2007(2) SCC 292, who spoke for the Court as follows :-

> "130. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary."

In cases, where the election is not called into question, judicial review of orders passed by the Election Commission, would be permissible, for otherwise, it would vest in the Election Commission a power beyond the mandate of the Constitution. In our considered opinion, such a reading of Article 329(b) of the Constitution of India, would be violative of the basic structure of the Constitution and thus, impermissible in law.

Counsel for the Election Commission has made reference to the following judgments, i.e. **Election Commission of India v. Union of India and others, 1995 Supp.(3) Supreme Court Cases 643, Election Commission of India v. State of Haryana 1984 (Supp) Supreme Court Cases, 104 and Election Commission of India v. State of T.N. And others 1995 Supp(3) Supreme Court Cases 379** to contend that the jurisdiction of the Courts, would not extend to issuance of directions to the Election Commission for conducting of polls on particular dates, independent of the perception of the Election Commission. We have no quarrel with the aforementioned judgments and do not propose to issue any direction setting out any particular date any particular manner for holding the elections. The directions that we propose to issue in this petition, are being issued, as counsel for the Election Commissioner had stated that the Election Commission would be able to hold the election prior to 27.02.2007 provided requisite Paramilitary Forces are provided by the Union of India. Even otherwise, the aforementioned judgments, relate to cases, where the High Courts had postponed the elections, thus, calling into questions, the very elections.

In **Election Commission of India v. State of Haryana (supra),** the Hon'ble High Court passed an interim order staying the

issuance of notification of election. The interim order was set-aside and it was held that the practice of parties obtaining exparte orders should not be resorted to and the ultimate decision as to whether it is possible and expedient to hold the elections vested with the Election Commission. This judgment does not in any manner aid the counsel for the Election Commission. As stated herein above, we are not calling into question the election.

The last judgment, namely, **Election Commission of India v. State of T.N. (supra),** for the reasons stated in this order, does not advance the case of the Election Commission, in any manner, whatsoever.

Before proceeding to the factual matrix, it would also be necessary to quote a para from Mohinder Singh Gill's case (supra).

> "And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system".
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> "61. Nobody will deny that the Election Commission in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden, wide discretion is fraught with tyrannical potential even in high personages, absent legal norms and institutional checks, and relaxation of legal canalisation on generous 'VIP' assumptions may boomerang. Natural justice is one such check on exercise of

power. But the chemistry of natural justice is confused in certain aspects, especially in relation to the fourfold exceptions put forward by the respondents.

62. So let us examine them each. Speed in action versus soundness of judgment is the first dilema. Punnuswami (supra) has emphasised what is implicit in Article 329(b) that once the process of election has started, it should not be interrupted since the tempo may slow down and the early constitution of an elected parliament may be halted. Therefore, think twice before obligating a hearing at a critical stage when a quick re-poll is the call. The point is well taken. A fair hearing with full notice to both or others may surely protract; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of 'hearing' as condition for decision-making be martyred for the cause of administrative immediacy ? We think not. The full panoply may not be there but a manageable minimum may make-do."

In the Beas Assembly Constituency on account of certain incidents, the Election Commission took a decision to postpone the election to 11.3.2007. In the State of Punjab, peaceful voting took place on 13.2.2007. The turn out of the voters was over 76% . Though lengthy arguments were addressed by Mr.M.L. Sarin, Senior Advocate appearing for the Election Commission of India, justifying postponement of elections from the Beas Assembly Constituency to 11.3.2007, we have no quarrel for

the postponement of election to 11.3.2007. It was perfectly within the domain of the Election Commission to postpone the election as it is the Election Commission, who is endowed with jurisdiction to conduct a free and fair election. We have also no difficulty if elections are held on 11.3.2007 in the Beas Assembly Constituency, but if a representation is made by the petitioner or others for preponing the election, so as to have the elections before the result of the counting of votes for the assembly in the State of Punjab, prior to 27.2.2007, in view of overall exercise of franchise by the people of Punjab in a peaceful manner and to avoid a voter to be affected by the result of seats of the legislative assembly of Punjab, which will be declared on 27.2.2007, as that would be detrimental against the concept of exercising a franchise without being swayed by the victory of one political party or the other political party, we had repeatedly requested counsel for the Election Commission to place before us material taken into consideration, by the Election Commission for rejection of prayer of preponement. We are hearing the matter for the last three days, and made it sufficiently clear that this court would not go into the sufficiency or adequacy of the material before the Election Commission, if the Election Commission has considered the matter on the basis of some material. We perused the original record. We could not find any material, which could lay the foundation of decision making process of the Election Commission of India, not to prepone the date of election to Beas Assembly Constituency. However, no material was placed before us.

We directed the Director General of Police, Punjab, to be present in Court to ascertain his views. The Director General of Police,Punjab, Mr.Virk was replaced at the instance of Election

Commission of India. The present Director General of Police, Punjab, Mr.R.S. Gill was selected by the Election Commission from a panel of three officers, whose names were sent to the Election Commission. There is no complaint against him by the Election Commission. Mr. Gill, when he appeared before us on 21.2.2007, stated that he was fully confident and competent to ensure a smooth and fair assembly election in Beas, prior to 27.2.2007. The Chief Secretary of the State of Punjab, in his affidavit, has stated that the law and order situation in Beas Constituency is conducive for holding free and fair election before 27.2.2007. It has further stated that the Government undertakes to make special security arrangements in Beas Constituency, to make sure that no untoward incident, which may be detrimental to free and fair poll process, takes place on or before the date of polling.

On 21.2.2007, after hearing Mr.Sarin, learned counsel appearing for the Election Commission of India, we had specifically, in view of the catena of cases and the law relating to conduct of election and non interference by the Courts, requested him to place on record some material, which was taken into consideration by the Election Commission for rejecting the prayer for preponement. In the morning today, when arguments commenced Mr.Sarin had shown us the notings on the file. In the notings on the file, we could not discern if any material had been taken into consideration. This Court would have not gone into the sufficiency of material or insufficiency of material but total lack of material with regard to the ground situation for a free and fair poll, prior to 27.2.2007, would enable this Court to exercise jurisdiction to ensure a free and fair election,in accordance with the constitutional mandate, enjoined upon the Election

Commission of India. The material could have been the request of the Election Commission to the Director General of Police,Punjab or to the Chief Electoral Officer-respondent no.2 for the State of Punjab or a request made for provisions of additional security personnel of Para Military organisations to the Central Government. Neither such a request was made by the Election Commission of India to any of the aforesaid authorities nor anything in this regard has been placed before us.

We must not loose sight of the fact that the whole foundation of the exercise of power by the Election Commission of India is to conduct, hold and supervise an election,where elections of other constituencies and result thereof should not affect an elector in the same constituency of the State, in so far as it is possible. In the absence of any ground inputs or material before it, Election Commission was not justified in reaching to a conclusion that it is not possible to conduct an election, prior to 11.3.2007. We must hasten to add that in a given case, it is also possible that on the basis of inputs and on the basis of subjective material before it, after having objective consideration, the Election Commission could have postponed election beyond 11.3.2007 but in the absence of any material and in the absence of any exercise done by the Election Commission of India in this regard insistence of holding the election on 11.3.2007, would be an action, which would be wholly arbitrary and irrational.

It is these norm of fairness of action, free from arbitrariness that has compelled us to exercise jurisdiction. A voter should be allowed to have a free expression of his vote, uninfluenced by the outcome of the majority of Assembly Constituency. The Election Commission has itself decided to hold counting of votes in the State of Punjab after 14 days of

polling, as elections being held at a distance of over 2000 Kms, in the State of Manipur and elections to be held in the State of Uttrakhand could be effected by the result announced of counting of votes in State of Punjab. That is the basis and rationale to have counting of votes in Punjab elections after the date of polling i.e. 13.2.2007 to 27.2.2007. Thus, to deny similar treatment to a constituency in the State of Punjab itself, without any material on record, would be an action, which would be arbitrary and discriminatory and not in furtherance of free and fair elections, to say the least.

In the morning, during the course of arguments, Mr.Sarin, learned counsel for the Election Commission of India stated that Election Commission of India has no reservation in holding the election prior to 27.2.2007, if the Union of India provides 10 Companies of Para Military Forces to maintain law and order. At that stage, we adjourned the matter and directed Ms.Daya Chaudhary, Assistant Solicitor General of India, to seek instructions, as to why the Union of India cannot provide the required 10 Companies of Para Military Forces for conduct of election in Beas Constituency prior to 27.2.2007. A fax message has been supplied to us, by the Assistant Solicitor General of India, stating that for elections in the Beas Constituency it will be possible to provide 10 Companies of Para Military Forces, as per directions of the Court. Now at this stage, Mr.Sarin wants to resile from his earlier statement and states that it is not possible, as the Election Commission would require atleast seven days, after the induction of the Para Military Forces, to hold elections. We are astonished at the stand of the Election Commission of India. We hold the Election Commission of India in a very high esteem and do not doubt its ability to

hold elections expeditiously. There is another reason for exercising our extra ordinary jurisdiction, which we should normally have avoided. The file notings shown to us by Mr.Sarin do not indicate any request having made to the Union of India, for supply of Para Military Forces. We find no reason, from the perusal of record, for not preponing the elections in the Beas Assembly Constituency. Strangely, we find no report from the State of Punjab either from the Director General of Police or from the Chief Secretary. It, therefore, seems that while postponing the poll to 11.3.2007, ground realities were taken into consideration, however, on the representation of the petitioner and others, to prepone the election, prior to 27.2.2007, when the counting of votes will be taken, ground realities were not taken into consideration as detailed above and decision was taken on irrelevant considerations or relevant considerations not taken into account. Therefore, in view of all the material before us, i.e. the letter from Union of India, committing placement of 10 Companies of Para Military Forces to maintain normalcy in the constituency, the statement of the Director General of Police, Punjab, and the affidavit filed by the Chief Secretary of the State of Punjab and in order to give a right to an elector, to exercise his or her vote uninfluenced by the results of the counting of votes in Punjab on 27.2.2007, we are confident that the Election Commission of India will hold elections prior to 27.2.2007 in the Beas Assembly Constituency.

One should not forget that the constitutional mandate to the Election Commission is to conduct free and fair polls, that is to say that even a single voter should not be swayed by the result of other constituencies. In **S.R. Bommai and others Vs. Union of India and**

**others**, 1994(3) SCC 1, State Assemblies had been dissolved after parliamentary elections, in the aftermath of the results of parliamentary elections, the President had dissolved the Assemblies, which had majority from other political parties. The promulgation by President of dissolution of such Assemblies and its satisfaction was tested in the said case. Although polling has taken place in the State of Punjab on 13.2.2007, the Election Commissioner rightly fixed 27.2.2007 for counting, as there were elections, in the States of Uttrakhand formerly known as Uttranchal and Manipur, where polling would be completed by 24.2.2007. Once Election Commission has itself decided not to count votes in State of Punjab, on the ground that elections in the State of Uttrakhand and Manipur would be affected by the result announced from Punjab , then same consideration should have been extended to the Beas Constituency, non-application of said consideration in the matter of Beas Assembly segment also makes the decision of the Election Commission of India arbitrary and irrational as well as discriminatory. It results into not applying the same yardsticks as a matter of principle, which the Election Commission of India has been applying in conducting of elections declaration of result and effect thereof on the voters.

Consequently, we direct the Union of India, the State of Punjab and the Director General of Police,Punjab, to provide all the necessary forces and personnel, which would be required by the Election Commission of India for smooth conduct of the election in the Beas Assembly Constituency, where every voter can exercise his right free from any fear or

influence, before 27.2.2007.

With these directions, the present petition stands disposed of.

( VIJENDER JAIN )
CHIEF JUSTICE

22.2.2007 ( RAJIVE BHALLA )
GS JUDGE